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In the
Supreme Court of the United States

W. KEVIN HUGHES, *et al.*,
Petitioners,

v.

TALEN ENERGY MARKETING, LLC
(F/K/A PPL ENERGYPLUS, LLC), *et al.*,
Respondents,

CPV MARYLAND, LLC,
Petitioner,

v.

TALEN ENERGY MARKETING, LLC
(F/K/A PPL ENERGYPLUS, LLC), *et al.*,
Respondents,

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that a novel state scheme that guarantees a generator a price different from the price approved by the Federal Energy Regulatory Commission ("FERC") for its wholesale electricity sales to a federally regulated wholesale-market operator intrudes on and conflicts with the exercise of FERC's exclusive jurisdiction over rates "received ... for or in connection" with wholesale electricity sales. 16 U.S.C. §824d(a).

PARTIES TO THE PROCEEDING

Petitioners are CPV Maryland, LLC; and the Chairman and Commissioners of the Maryland Public Service Commission (at the time of the relevant orders, Douglas R.M. Nazarian, Harold Williams, Lawrence Brenner, Kelly Speakes-Backman, and W Kevin Hughes), who were sued in their official capacities as Chairman and Commissioners.

Respondents are Talen Energy Marketing, LLC (f/k/a PPL EnergyPlus, LLC); Brunner Island, LLC (f/k/a PPL Brunner Island, LLC); Holtwood, LLC (f/k/a PPL Holtwood, LLC); Martins Creek, LLC (f/k/a PPL Martins Creek, LLC); Montour, LLC (f/k/a PPL Montour, LLC); Susquehanna Nuclear, LLC (f/k/a PPL Susquehanna, LLC); Lower Mount Bethel Energy, LLC; Talen New Jersey Solar, LLC (f/k/a PPL New Jersey Solar, LLC); Talen New Jersey Biogas, LLC (f/k/a PPL New Jersey Biogas, LLC); Talen Renewable Energy, LLC (f/k/a PPL Renewable Energy, LLC); PSEG Power LLC; and Essential Power, LLC.

CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 statement included in the brief in opposition was amended on June 22, 2015, but otherwise remains current. This brief on the merits is joined by the following respondents:

Talen Energy Marketing, LLC (f/k/a PPL EnergyPlus, LLC); ***Brunner Island, LLC*** (f/k/a PPL Brunner Island, LLC); ***Holtwood, LLC*** (f/k/a PPL Holtwood, LLC); ***Martins Creek, LLC*** (f/k/a PPL Martins Creek, LLC); ***Montour, LLC*** (f/k/a PPL Montour, LLC); ***Susquehanna Nuclear, LLC*** (f/k/a PPL Susquehanna, LLC); ***Lower Mount Bethel Energy, LLC***; ***Talen New Jersey Solar, LLC*** (f/k/a PPL New Jersey Solar, LLC); ***Talen New Jersey Biogas, LLC*** (f/k/a PPL New Jersey Biogas, LLC); and ***Talen Renewable Energy, LLC*** (f/k/a PPL Renewable Energy, LLC) ("Talen Parties") are all indirect subsidiaries of Talen Energy Corporation. The shares of Talen Energy Corporation are publicly traded. No other publicly held company has a 10% or greater ownership interest in the Talen Parties or Talen Energy Corporation.

PSEG Power LLC is a wholly-owned subsidiary of Public Service Enterprise Group Incorporated, a publicly traded corporation. No other publicly held company has a 10% or greater ownership interest in PSEG Power LLC or Public Service Enterprise Group Incorporated.

Essential Power, LLC, formerly known as North American Energy Alliance, LLC, is a Delaware limited liability company. No publicly held corporation holds an interest in Essential Power, LLC.

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INTRODUCTION

This case presents a very narrow preemption question: May a state mandate that a generator receive a price different from the FERC-approved price for that generator's wholesale sales of electricity to a federally regulated wholesale-market operator? The answer is plainly no. Under the Federal Power Act, FERC alone has the power to decide what wholesale rates are just and reasonable, and FERC has already approved market mechanisms for determining what rate a generator should receive in connection with its sales to the wholesale-market operator. States may not usurp that power by ordering third parties to ensure that a generator is paid something different from that FERC-approved rate for those very same wholesale sales.

Yet that is precisely what Maryland has done. Maryland has obligated its local utilities to enter into contracts that ensure that Maryland's preferred generator, CPV Maryland ("CPV"), will receive a fixed price for all its wholesale sales to PJM Interconnection, LLC ("PJM") for 20 years—no matter what rate the FERC-approved market mechanisms for PJM's wholesale auctions may produce for those same sales. Forced payments under those state-mandated contracts are tied directly and expressly to CPV's actual, fully consummated wholesale sales to PJM. If there are no such sales, there is no payment obligation. And for each unit of energy or capacity that CPV does sell to the PJM, Maryland requires its local utilities to make up the difference between the prevailing FERC-approved price paid to CPV by PJM

and the price set forth in the state-mandated contracts.

That blatant incursion on FERC's exclusive jurisdiction over the "rates and charges made, demanded, or received ... for or in connection with" wholesale sales, 16 U.S.C. §824(b), was no accident. Maryland adopted its order for the express purpose of overriding federal policy judgments with which the state disagrees. FERC is cognizant that prices in the organized wholesale markets play a role in incentivizing new generation, and it understands that investors in new projects tend to prefer fixed prices for multiple years. And under certain circumstances, FERC has authorized PJM to pay new generators a fixed rate for their sales to PJM for three years. In FERC's view, that three-year guarantee strikes the appropriate balance between incentivizing efficient new generation and retaining efficient existing generation. Maryland thought a longer period was necessary to incentivize new generation in Maryland and told FERC as much. When FERC denied Maryland's request to extend the period of fixed prices to ten years, Maryland attempted to override that federal judgment by guaranteeing CPV a fixed price for its sales to PJM for 20 years. Thus, by attempting to dictate what CPV will receive in connection with its sales to PJM, Maryland's regulatory scheme not only intrudes on an exclusive federal field, but expressly and intentionally conflicts with federal policy.

With no real answer to the obvious preemption problems with Maryland's actions, petitioners instead spend most of their briefs trying to analogize those actions to other initiatives designed to incentivize new

generation that may or may not be preempted. But this case is not about the validity of direct subsidies, bilateral contracting, state procurement processes, or state regulation of purchasing decisions of utilities. Instead, it is about Maryland's novel effort to use state regulation to guarantee a generator a rate different from the FERC-approved rate for its wholesale sales to PJM, and to make that guarantee last 20 years. Whatever else states may do to incentivize new generation, they may not do that. As every federal judge to consider the issue has concluded, a state effort to override the FERC-approved rate of a wholesale sale to a wholesale-market operator clearly crosses the jurisdictional line.

STATEMENT OF THE CASE

A. The Federal Regulatory Regime

Federal regulation of the wholesale electricity market dates back nearly a century. Historically, utilities were "vertically integrated," meaning they not only delivered electricity to retail customers within their service territories, but also generated the electricity they delivered. *See New York v. FERC*, 535 U.S. 1, 5 (2002). Because their operations were almost exclusively intrastate, these vertically integrated utilities were heavily regulated by states, which set the rates a utility could charge retail customers based on costs that the utility incurred in generating and delivering electricity. Pet.App.42a-43a.[1]

Because electricity demand fluctuates, an electricity supplier must be equipped to serve not just

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[1] Unless otherwise noted, all appendix citations are to the appendix to the petition in No. 14-623.

relatively static demand, but also significantly increased demand during peak periods. Traditionally, vertically integrated utilities did this by building generation facilities intended to operate only when demand was at its peak—even if that meant they operated for as few as 20 hours a year. The obvious inefficiencies of having each utility invest in facilities that spent most of the year idle soon led utilities to look for ways to pool their resources by buying from or selling to one another the additional electricity that these facilities could produce. To facilitate these "wholesale" transactions (*i.e.*, sales for resale), utilities built high voltage transmission lines across which electricity could be transferred from one utility to another. Pet.App.42a-43a.

As these wholesale sales began to cross state lines, the question arose whether the Commerce Clause barred states from regulating them. This Court answered that question in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), concluding that regulation of these "fundamentally interstate" transactions could come only from "exercise of the power vested in Congress." *Id.* at 89-90.

Congress responded with the Federal Power Act of 1935 ("FPA"), which established a new federal agency (then the Federal Power Commission, now FERC) charged with providing "effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758 (1973). Section 201(b) of the FPA grants FERC exclusive jurisdiction over "the transmission of electric energy

in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce," including the power to determine what "rates and charges made, demanded, or received ... for or in connection with the transmission or sale" of electricity at wholesale are "just and reasonable." 16 U.S.C. §§824(b), 824d(a), 824e. FERC also is charged with ensuring that wholesale sales are neither unduly preferential nor unreasonably discriminatory. *Id.* §824d(b).

The FPA is carefully structured to preserve state jurisdiction over matters as to which FERC is not expressly granted authority, including the regulation of generation facilities. The states' reserved power over generation, however, is explicitly subordinated to the powers that the FPA expressly grants FERC. In particular, section 201(b) provides that FERC "shall not have jurisdiction, *except as specifically provided in this subchapter and subchapter III of this chapter*, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." *Id.* §824(b)(1) (emphasis added).

B. The Rapid Expansion of the Federally Regulated Wholesale Market

Although wholesale electricity sales continued to increase modestly, they remained largely ancillary to the vertically integrated regime. While vertically integrated utilities continued to sell excess capacity through wholesale transactions, generation facilities that produced electricity solely for wholesale sale

generally did not exist. That began to change, however, with several federal initiatives in recent decades. In 1978, Congress enacted the Public Utility Regulatory Policies Act, 16 U.S.C. §2601, *et seq.*, which required vertically integrated utilities to purchase power at wholesale from certain independent generators. But because "the owners of transmission lines" often denied generators "access to their transmission lines on competitive terms and conditions," *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 682 (D.C. Cir. 2000), wholesale sales still accounted for only 10 to 15 percent of power sales. James J. McGrew, *FERC: Federal Energy Regulatory Commission* 151-52 (2d ed. 2009).

Congress addressed this dynamic through the Energy Policy Act 1992, Pub. L. No. 102-486, 106 Stat. 2776, which authorized FERC to ease restrictions on access to interstate transmission lines so that generators selling their electricity at wholesale could obtain access to transmission lines owned by vertically integrated utilities. FERC followed that up with Order No. 888, which required owners of transmission lines to offer access on a non-discriminatory basis. 61 Fed. Reg. 21,540 (May 10, 1996). These and other regulatory measures paved the way for explosive growth in wholesale transactions that transformed the industry "from one of local, self-sufficient monopolies to one of nationwide competition and electricity transmission." *New York*, 535 U.S. at 23.

As this expanded wholesale marketplace took shape, states began to question whether vertical integration still made sense. Many (but by no means all) states ultimately opted to restructure their

electricity industries by disentangling their utilities' generation, supply, and distribution functions. Utilities—renamed "electric distribution companies" or "EDCs"—retained a regulated monopoly over the service of delivering electricity to retail customers via local distribution networks. But utilities generally divested their generation assets to non-regulated affiliates that could sell their electricity solely at wholesale, and the utilities also faced new competition in supplying electricity to retail customers. By forcing generators and suppliers to compete for business rather than guaranteeing utilities regulated cost recovery, states sought to promote efficiency and lower prices.

In choosing to restructure, states also made their retail electricity markets largely dependent on the federally regulated wholesale market, into which the non-regulated generation companies may sell their power, and from which the competing retail suppliers may purchase power for resale. While that reliance allowed states to reap the benefits of lower prices on a more competitive wholesale market, it also meant that they necessarily (and voluntarily) surrendered some of their control over their electricity markets.

In 1999, Maryland embraced this new model, restructuring its market through the Electric Customer Choice and Competition Act. Seeking to enable its residents to "benefit more from a competitive market for their electricity rather than being captive to a single utility that had a monopoly on their electricity service," Pet.App.75a, Maryland opted to allow retail customers to choose whether to purchase electricity from an EDC or another supplier,

and to allow both EDCs and other suppliers to purchase electricity for resale on the federally regulated wholesale market.

The significance of this decision was not lost on Maryland. As Maryland's Public Service Commission ("PSC") acknowledged, spinning off Maryland's "utilities' generating assets" meant that "electricity previously subject to traditional rate-of-return regulation (in which the PSC set the utility's profit through a state regulatory proceeding) would now be purchased ... in the federally regulated wholesale electricity market." JA174. And by relying on the wholesale market, the state anticipated that it would no longer play as direct of a role in "evaluat[ing] the need for new generation stations in Maryland", instead, "that need is determined by the marketplace." Pet.App.75a-76a. In short, as Maryland recognized, by voluntarily doing away with vertical integration, the state opened itself up to the "benefit [of] a competitive market," Pet.App.75a, but also to the risks of participation in and reliance on a federal market that the state could not regulate. Pet.App.75a.

C. PJM and the Reliability Pricing Model

As the interstate wholesale market expanded, FERC encouraged participants to organize regional transmission organizations ("RTOs") to manage the open access transmission lines in large portions of the country. PJM is the nation's largest RTO, administering the wholesale market for a region comprising all or part of 13 states, including Maryland, and the District of Columbia. JA498, JA507. PJM encompasses more than 1,300 electricity generators and nearly 60,000 miles of transmission

lines. JA498. Although PJM is a private entity, it is pervasively regulated by FERC, which approves all aspects of the pricing mechanisms PJM uses to determine which generating resources to dispatch and to ensure adequate wholesale supply to meet demand at just and reasonable rates. JA504.

PJM employs multiple FERC-approved pricing mechanisms to achieve these ends. First, PJM operates an auction through which it purchases energy from generation resources on an hourly or a daily basis, and then resells that energy to retail electricity suppliers (also known as "load serving entities," or "LSEs"), which in turn resell it to retail customers. The rate for those wholesale transactions is not set by PJM unilaterally; instead, it is produced by the auction itself, through a competitive mechanism that FERC has approved. Generation resources offer their energy into the auction for delivery in the next hour or 24 hours at a price of their choosing, and PJM accepts offers from lowest to highest until it has enough energy to meet the LSEs' demand. The highest offer PJM accepts becomes the "market-clearing price," which PJM pays to each resource that bid at or below that price, even if its offer was lower. Pet.App.62a-63a. PJM then sells the energy to the LSEs at the same market-clearing price, thereby balancing out the cost of purchasing it. Both PJM's purchases and its sales are wholesale transactions, and both occur at the same price. And FERC deems the market-clearing price produced by the auction just and reasonable, thereby obviating the need to review each sale to PJM on a case-by-case basis.

PJM operates a similar market for "capacity," which is essentially a commitment to produce energy if called upon, to ensure that adequate energy will be available to satisfy future peak demand. Because a single LSE's failure to maintain sufficient capacity can destabilize an entire interstate region, PJM requires each LSE to acquire a certain amount of capacity. Before 2006, PJM allowed LSEs to wait until the day before each operating day to meet their capacity requirements. But that regime failed to "provide price signals that would elicit solutions to reliability problems in enough time before the problems occur." *PJM Interconnection, L.L.C.*, 115 FERC ¶61,079, at ¶29 (2006). In essence, by the time it was apparent new generation was needed, it was too late to build it. *Id.* ¶36. This "lack of price signals" contributed to inefficient retirement of existing generation and insufficient incentives for new generation, and the absence of any obligation to secure capacity in advance resulted in a dearth of long-term bilateral contracting. *Id.* ¶29, ¶70.

PJM and FERC determined that the solution to these problems was a more forward-looking capacity construct dubbed the reliability pricing model ("RPM"). *See PJM Interconnection, L.L.C.*, 117 FERC ¶61,331 (2006). Under this model, PJM forecasts how much capacity the region will need to meet peak demand, decides how much of that capacity each LSE is responsible for acquiring, and requires LSEs to secure the necessary capacity three years in advance of the anticipated need. LSEs may meet their requirements by constructing their own generating facilities, purchasing capacity through bilateral contracts with resources willing to sell it to them, or

purchasing capacity through PJM's annual capacity auction. By operating on a three-year forward basis, the capacity market is intended to provide price signals that help market participants decide now whether to build new generation facilities to satisfy capacity needs three years hence.

PJM's capacity auction, every aspect of which is approved by FERC, operates much like its hourly and daily energy auctions. Wholesale sellers must offer all their uncommitted capacity into the auction at a price of their choosing, and PJM accepts offers from lowest to highest until it has enough capacity to serve its forecast of the entire region's demand. The highest bid accepted becomes the market-clearing price, which PJM pays to all resources whose offers are accepted. PJM then resells the capacity to LSEs who need it at the same price at which PJM purchased it. By paying all sellers the market-clearing price, PJM seeks to "create[] incentives for sellers to minimize their costs, because cost-reductions increase a seller's profits. And when many sellers work to minimize their costs, competition among them keeps prices as low as possible." *PJM*, 117 FERC ¶61,331, at ¶141.

That said, PJM does make adjustments to the market-clearing price to "reflect[] the value of the energy at the specific location and time it is delivered," as well as "the effect of actual operating conditions." JA515-16. PJM may pay a higher rate, for instance, to generating resources located in or near areas where transmission-line congestion limits how much electricity can be imported from other areas. These regional adjustments are designed to establish "price signals that encourage new generation sources to

locate in areas" experiencing such congestion. JA517 Relying on these signals, generation companies decide whether and where to invest in new plants and whether to retire existing plants, and PJM decides whether additional transmission lines are needed. LSEs, for their part, use these price signals to determine whether to enter into bilateral contracts, construct their own generation resources, or rely on the PJM auction to meet their capacity requirements.

PJM and FERC recognize that, in certain circumstances, the auction's price signals alone may be insufficient to incentivize efficient new generation. To address that dynamic, the FERC-approved market mechanism provides for a new entry price adjustment ("NEPA") available to new resources that satisfy certain size and locational conditions. In an effort to "provide support to the new entrant" in those circumstances, the NEPA allows a new generator that meets those conditions to lock in a single price for its capacity sales to PJM for its first three years on the market (*i.e.*, for a three-year term beginning three years in the future). That lock-in is designed to ensure the generator three years of predictable—indeed, guaranteed—return on its investment. *PJM Interconnection, L.L.C.*, 128 FERC ¶61,157, at ¶101 (2009). The NEPA is the one exception to PJM's policy of non-discrimination among new and existing resources—*i.e.*, of seeking to obtain the least-cost set of generating resources, regardless of whether they are new or existing. *See id.* ¶102 ("[b]oth new entry and retention of existing efficient capacity are necessary to ensure reliability").

Five years after this comprehensive capacity construct was implemented, FERC found that it "has in fact succeeded in securing sufficient capacity to meet reliability requirements for the PJM region." *PJM Interconnection, L.L.C.*, 137 FERC ¶61,145, at ¶3 (2011).

D. Maryland's Unsuccessful Effort to Convince FERC to Alter the NEPA and Its Subsequent Generation Order

Although Maryland voluntarily abandoned vertical integration to reap the benefits of the interstate wholesale market, within a few years it began to "voice concerns" that "deregulation had not worked well" for Maryland. Pet.App.77a; JA639. Unhappy with the rates PJM's FERC-approved market mechanisms were producing, Maryland passed a law requiring the state's PSC to "consider changes"—including a possible return to vertical integration—to provide consumers reliable electricity "at the best possible price." 2007 Md. Laws, SB 400, http://1.usa.gov/22QhsY9. In response, the PSC examined "how Maryland might 're-regulate' its electricity markets." JA234. The PSC submitted two reports contending that PJM's price signals were doing too little to encourage "new generation and transmission resources" in Maryland, and as a result were leading Maryland consumers to "pay much higher than average prices for wholesale (and thus retail) electricity." JA159-60; *see also* JA281-86.

The PSC considered "full re-regulation" through a return to vertical integration but deemed the costs too high and the potential benefits too uncertain. JA236. Instead, it recommended "re-regulation light"—

continuing to rely on the PJM market to serve Maryland's electricity needs but using state regulation to attempt to decrease the cost of purchasing energy and capacity at wholesale from PJM. JA225-26; JA641. Specifically, the report recommended using state regulation to incentivize new generation that market forces alone would not support, and that could offer its energy and capacity into PJM's auctions. JA225; JA641. In the PSC's view, introducing new state-subsidized generation into the auctions could help lower the market-clearing price, thereby inuring to the benefit of the various LSEs that serve Maryland's retail customers, which purchase much of their energy and capacity from PJM. JA226. The PSC informed the legislature that it would "undertake a new investigation in 2009 to determine whether[,] and on what term[s], to direct or solicit the construction of one or more new power plants in Maryland." JA237.

In the meantime, the PSC attempted to convince FERC to revise the PJM market rules to provide the incentives that it believed necessary to bring new generation to Maryland. Specifically, the PSC asked FERC to expand the NEPA's three-year price lock-in for sales to PJM to at least 10 years, reasoning that a three-year guaranteed return on investment left too much uncertainty to attract new generation to Maryland.

FERC was not persuaded and rejected Maryland's proposal. *PJM Interconnection, L.L.C.*, 126 FERC ¶61,275, at ¶¶146, 149 (2009). Although it "recognize[d] that a longer commitment period may aid the developer in financing a project," FERC

concluded that "giving new suppliers longer payments and assurances unavailable to existing suppliers" would upset the PJM auction's "balance" between new and existing generation. *Id.* ¶¶149-50; *see also id.* ¶150 (auction "was designed to provide long-term forward price signals and not necessarily long-term revenue assurance"). On rehearing, FERC reiterated that the PJM "market should be designed correctly so that the contribution to reliability from both new entrants and existing suppliers is compensated comparably." 128 FERC ¶61,157, at ¶103. As a matter of federal policy, it explained, "[b]oth new entry and retention of existing efficient capacity are necessary to ensure reliability and both should receive the same price so that the price signals are not skewed in favor of new entry." *Id.* ¶102; *see also id.* ¶103 n.61 ("in the long run, extending NEPA could lead to higher overall costs if existing capacity exits and has to be replaced by new entry"). Maryland petitioned the D.C. Circuit for review of FERC's decision and lost. *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283 (D.C. Cir. 2011).

At that point, having failed to persuade FERC to provide a longer price guarantee for sales to PJM, Maryland decided to override both that determination and FERC's determination of what generators should receive in connection with their sales to PJM. Complaining that "RPM's signal remains unable to anchor the financing new generation development requires," JA305, Maryland decided to offer a new in-state generator a fixed price for all of its sales to PJM for *20 years*, rather than the three years provided by the NEPA.

To that end, Maryland issued a request for proposals ("RFP") to build a new generation facility. The request required the bidder to agree to build a new gas-fired facility that must offer all of its energy and capacity to PJM. In return, it promised the winning bidder something it called a "Fixed/Indexed Pricing Contract for Differences." JA343-44. This pricing contract is not a contract with the state itself. Nor is it a contract for the sale of energy or capacity from the winning bidder to the contracting counterparty. Rather, it is a contract that Maryland promised to force its EDCs to enter into with the new generator, obligating them to ensure that the generator would receive something other than the FERC-approved rate in connection with its wholesale sales *to PJM*. The forced contract guarantees that, "for each unit of energy and capacity [that the new generator] s[ells] to PJM" for 20 years, it will receive the price set forth in the contract—regardless of what the PJM market-clearing price may be. Pet.App.89a.

Payments under the contract thus are explicitly conditioned on, and made in connection with, the generator's wholesale sales to PJM. The generator is required to offer its energy and capacity into the PJM auction. If its offer is too high and is not accepted by PJM, the EDCs are not required to pay the generator anything. If its offer is accepted and the "contract price" is higher than the market-clearing price paid by PJM, then the EDCs must pay the generator the difference for each unit of energy and capacity that it sold to PJM. Conversely, if the PJM price exceeds the "contract price," the generator must pay the difference to the EDCs. Either way, the EDCs do not purchase any energy or capacity from the generator; instead,

their sole role is to make or collect whatever payments are necessary to ensure that the generator receives the contract price, rather than the market-clearing price, for its sales to PJM. The EDCs may pass any costs or credits achieved along to ratepayers. Through this arrangement, Maryland guarantees the generator a predetermined price for its sales to PJM for 20 years, regardless of what PJM's price turns out to be.

By the time Maryland issued the RFP, its consultants agreed with FERC that the PSC's earlier reliability concerns had largely been addressed by significant new transmission, additional generation, and decreased demand. *See* JA486-89. Accordingly, the principal issue Maryland sought to address was not reliability, but rather an economic concern that PJM's rates were too high. JA478; JA655. And the principal benefit Maryland sought to achieve from introducing new state-subsidized generation into the PJM auctions was to drive those rates down, making it cheaper for Maryland's retail suppliers to purchase energy and capacity at wholesale from PJM. JA478; JA492; JA493.

Although the FERC-approved market mechanisms were insufficient to attract new generation to Maryland in the PSC's view, the PSC received seven proposals in response to its RFP and selected CPV Pet.App.90a. CPV negotiated several terms of the pricing contract—not with the EDCs, but with the PSC. JA663-64. After resolving these differences, the PSC issued the Generation Order forcing the EDCs to execute 20-year pricing contracts with CPV, which they did under protest. JA607 These contracts grant CPV precisely the kind of long-

term pricing guarantee for its wholesale sales to PJM that PJM and FERC rejected. Whereas PJM and FERC allow new generators to lock in a price only for three years (and only under certain circumstances), Maryland has guaranteed CPV a predetermined price for its sales to PJM for 20 years. Proceeding on the theory that these were purely "financial contracts that do not provide for the sale of capacity or energy," CPV took the position that the contracts were "not subject to the filing and reporting requirements under section 205 of the Federal Power Act" and thus did not file them with FERC for review at that time. JA141 n.14.

It is undisputed that, without Maryland's guarantee, CPV would not have developed its proposed facility. Pet.App.92a. CPV had previously determined that the prices generated by PJM's auctions were neither high nor certain enough to incentivize it to build a new generation facility in Maryland, and CPV had been unable to find a buyer willing to agree to a long-term bilateral contract with a price as high as the one guaranteed by Maryland. But within months of executing the pricing contract and before breaking ground on its new facility, CPV successfully offered its capacity into PJM's capacity auction for 2015. Pet.App.92a.

E. Proceedings Below

Respondents are generating companies that, as a result of Maryland's order, have suffered reduced revenues for their sales to PJM and been forced to forgo investments in new generating assets. Respondents brought suit in the District of Maryland challenging Maryland's order as, among other things, preempted by federal law.

1. After a six-day trial that included extensive evidence and testimony, the District Court held Maryland's order preempted. The court concluded that the "Order, through the [Pricing Contract], establishes the price ultimately received by CPV for its actual physical energy and capacity sales to PJM in the PJM Markets" and thus intrudes upon an exclusively federal field. Pet.App.113a. The court rejected petitioners' argument that the order creates only a "purely financial contract, financial hedging agreement, or swap agreement" that involves no payment for an actual sale of energy or capacity, instead finding "that the contract price represents a fixed revenue stream for *actual energy and capacity sales* into the PJM Markets." Pet.App.114a-15a (emphasis added).

Given its field preemption holding, the court declined to decide whether Maryland's order is also conflict preempted. Pet.App.129a-30a. But it rejected respondents' Commerce Clause attack on the order, even though the order expressly rendered out-of-state applicants ineligible for its preferential pricing terms. Pet.App.151a.

2. The District Court's decision was reinforced weeks later by the District of New Jersey, which held a similar New Jersey regulatory scheme preempted. *See PPL EnergyPlus, LLC v. Hanna*, 977 F.Supp.2d 372 (D.N.J. 2013). Like Maryland, New Jersey was dissatisfied with FERC's refusal to guarantee new generators a long-term fixed price for their sales to PJM. And like Maryland, New Jersey decided to try to solve this purported problem by forcing its utilities to enter into contracts guaranteeing new state-

selected generators a fixed price for their capacity sales *to PJM* for 15 years. As New Jersey candidly acknowledged in the accompanying findings, its law was designed to achieve through "State policy" the kinds of "structural changes" in the federal wholesale market that were "previously denied by FERC." N.J.S.A. §48:3-98.2(c)-(d). The District Court had little trouble finding New Jersey's law preempted.

3. In a unanimous opinion authored by Judge Wilkinson, the Fourth Circuit affirmed the District Court's decision holding Maryland's order preempted. As the Fourth Circuit explained, "[a]lthough states plainly retain substantial latitude in directly regulating generation facilities, they may not exercise this authority in a way that impinges on FERC's exclusive power to specify wholesale rates." Pet.App.20a. The court held that Maryland's order does just that, as it "functionally sets the rate that CPV receives for its sales in the PJM auction" and "supersedes the PJM rates that CPV would otherwise earn." Pet.App.17a, 19a. As the court put it: "Maryland has chosen to incentivize generation by setting interstate wholesale rates. This particular choice of means is impermissible." Pet.App.21a.

The court also concluded that "principles of field and conflict preemption in this case are mutually reinforcing," as Maryland's order not only displaces FERC-approved wholesale rates, but also "disrupts [PJM's price-signal] scheme by substituting the state's preferred incentive structure for that approved by FERC." Pet.App.21a, 23a. The order does so by guaranteeing CPV a fixed price for its sales to PJM for 20 years, even though FERC explicitly rejected

Maryland's proposal to expand the NEPA's three-year guarantee as inconsistent with its policy of non-discrimination between new and existing generation. Pet.App.23a-24a. By providing its own 20-year pricing guarantee, the court explained, Maryland "sought to achieve through the backdoor of its own regulatory process what it could not achieve through the front door of FERC proceedings." Pet.App.24a. "Circumventing and displacing federal rules in this fashion is not permissible." Pet.App.24a.

In reaching those conclusions, the court repeatedly stressed "the limited scope of [its] holding, which is addressed to the specific program at issue." Pet.App.21. As the court reiterated in declining to opine on the validity of a variety of programs petitioners invoked as analogous, "[i]t goes without saying that not 'every state statute that has some indirect effect' on wholesale rates is preempted." Pet.App.21a. Here, "however, the effect ... on matters within FERC's exclusive jurisdiction is neither indirect nor incidental"; instead, Maryland's scheme "strikes at the heart of the agency's statutory power to establish rates for the sale of electric energy in interstate commerce." Pet.App.21a. Whatever else states may do to incentivize generation, that "is simply a bridge too far." Pet.App.25a.[2]

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[2] Having found the order preempted, the Fourth Circuit declined to address respondents' Commerce Clause challenge. Thus, if this Court were to find the order not preempted, it would need to remand to allow the Fourth Circuit to consider the Commerce Clause objection, which is substantial. Maryland expressly discriminated against out-of-state participants in interstate commerce by refusing to offer its preferential pricing

4. Two years after signing the pricing contracts and on the same day that the Fourth Circuit affirmed their invalidity, CPV filed its invalidated Maryland and New Jersey contracts with FERC, claiming for the first time that FERC should review them as if they were bilateral contracts for the sale of energy and capacity from one party to another. *See CPV Shore, L.L.C.*, 148 FERC ¶61,096 (2014). In the ensuing proceedings, however, CPV acknowledged that it was continuing to argue in court that "the CPV Agreements are *not* subject to" review by FERC. *Id.* ¶¶4-5 (emphasis added). FERC rejected CPV's filings, noting that the contracts were no longer valid and "were entered into pursuant to state programs that have now been declared invalid by two Federal District Courts and the U.S. Court of Appeals for the Fourth Circuit." *Id.* ¶¶28, 30-31.

5. Shortly after FERC rejected CPV's filings, a unanimous Third Circuit panel affirmed the District Court's holding that New Jersey's nearly identical scheme is preempted. *See PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (2014), petitions pending, Nos. 14-634 & 14-694 pending.

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for sales into an interstate market to out-of-state market participants. Though Maryland attempted to justify its facial discrimination with a reliability interest, the trial evidence demonstrated both that any reliability concerns had largely subsided by the time the state issued the order and that Maryland had nondiscriminatory alternatives to alleviate any lingering concerns. In reality, Maryland's interest was as economic and protectionist as one would expect from such facial discrimination.

SUMMARY OF ARGUMENT

Maryland's Generation Order is preempted three times over. It is a blatant effort to guarantee CPV a rate in connection with its wholesale sales to PJM that is different from the rate that FERC, in the exercise of its exclusive jurisdiction over wholesale sales, deems just and reasonable. It is an avowed effort to ensure that CPV receives a guarantee of fixed payments in connection with its sales to PJM for a far longer period than FERC deems optimal. And it is an intentional effort to deflate the PJM rate; Maryland sought to use new generation to artificially suppress PJM prices because Maryland's retail electricity suppliers purchase most of their energy and capacity from PJM and therefore stand to benefit from PJM prices lower than those that would prevail absent Maryland's interference. Maryland's order thus not only plainly intrudes on FERC's exclusive authority, but also conflicts with FERC's policy judgments in at least two different ways.

The preemption analysis in this case is straightforward because Maryland's order is directed to what CPV receives in connection with its sales *to PJM*. FERC is hardly indifferent to what wholesale sellers like CPV receive for their sales *to PJM*. FERC has specifically approved the pricing mechanisms through which the rates for wholesale sales to PJM are to be determined, and it has deemed wholesale rates produced by those mechanisms just and reasonable. Accordingly, any sale to PJM is, by definition, a wholesale sale, and the auction rate that the seller receives for such a sale is, by definition, just and reasonable. Yet under Maryland's order, CPV is

entitled to receive, for its sales *to PJM*, something other than what PJM is paying for those very sales.

Intrusions on FERC's exclusive jurisdiction over wholesale rates do not come much clearer than that. States simply do not have the power to order that a generator be paid something other than the FERC-approved PJM rate for its sales *to PJM*. That would seem obvious even if the FPA simply granted FERC the authority to determine the rate for a wholesale sale, but it is confirmed beyond all doubt by the FPA's grant of authority to FERC to determine what the seller "receives ... for or in connection with" a wholesale sale. 16 U.S.C. §824d(a). The payments Maryland forces its EDCs to make to CPV are plainly in connection with CPV's sales to PJM, and they ensure that CPV receives something different in connection with those sales from the rate that FERC has deemed just and reasonable.

To make matters worse, Maryland's actions are the product of an avowed effort to override not just FERC's approved rates for wholesale sales to PJM, but the federal policy underlying them. FERC has concluded that the best way to secure a reliable supply of energy and capacity in the PJM auctions at just and reasonable rates is by encouraging participation by a mix of new *and existing* generation. And to encourage that desired mix, FERC has concluded that new and existing resources should generally receive the same rate for their sales to PJM, subject only to a limited exception under which certain new resources may lock in a fixed price for their sales to PJM for three years. FERC steadfastly has resisted calls—including calls from Maryland—to extend this period, explaining that

doing so would skew the auctions too far in the direction of favoring new resources over existing ones.

Maryland's regulatory scheme is a deliberate effort to override that federal policy judgment by providing CPV with price stability for its sales to PJM for *20 years*, not just three. Maryland thus has not just displaced the FERC-approved rate for CPV's sales to PJM, but has replaced it with exactly the kind of long-term pricing guarantee that FERC has rejected as inconsistent with its efforts to secure just and reasonable wholesale rates in the PJM auctions. In other words, Maryland's regulatory scheme not only overrides FERC's *actual exercise* of its exclusive authority over wholesale rates, but also does so for the *express purpose* of overriding the federal policy that led FERC to regulate in the manner it has chosen. Wherever the precise line between federal and state regulation of the electricity market may lie, Maryland's actions far surpass it.

Petitioners point to FERC's adoption of regulatory countermeasures as evidence that FERC's regulatory scheme and Maryland's order can co-exist. But a federal agency's felt-need to try to counteract the distorting effects of a state law is powerful evidence of a preemption problem. In all events, there is no need to speculate about FERC's views of Maryland's order. FERC has made clear that it considers the order preempted and believes the order has a baleful effect on the PJM auctions.

Petitioners fare no better with their attempts to analogize Maryland's order and pricing contracts to traditional bilateral contracts and procurement orders. The only bilateral sales of energy or capacity

for resale at issue here are CPV's sales to PJM. The obligation Maryland imposed on the EDCs—complete strangers to those transactions—to make payments to CPV for those sales to PJM is not like any traditional bilateral wholesale energy or capacity contract. The EDCs do not purchase any capacity or energy from CPV, and they make payments to CPV only because Maryland forces them to do so. Nor are the pricing contracts "procurement orders," as the EDCs procure nothing in exchange for their payments. In the end, petitioners' efforts to point to more traditional options backfire, as they just underscore that what Maryland truly wanted was the ability to guarantee new generation in Maryland while simultaneously suppressing the PJM prices that get passed on to Maryland's consumers. That latter effect is just one more conflict with federal policy, and one more reason why this order is preempted while traditional bilateral contracts and procurement orders are not.

None of that means that Maryland is without options for incentivizing new generation within its borders. To the contrary, Maryland has an array of tools at its disposal for achieving its legitimate goals—ranging anywhere from providing subsidies that are not tied to FERC-regulated wholesale sales, to opting out of the PJM market entirely and returning to a vertically integrated regime. But what Maryland may *not* do is try to incentivize new in-state generation by altering FERC's approved wholesale rates, or replacing FERC's approved rate-setting mechanisms with mechanisms more to its liking. Because that is precisely what Maryland's order does, it is preempted.

ARGUMENT

I. Maryland's Order Is A Direct Intrusion On FERC's Exclusive Jurisdiction Over Wholesale Sales Of Electric Energy.

It is beyond cavil that FERC has exclusive regulatory power over the field of interstate wholesale electricity sales. The FPA expressly grants FERC jurisdiction over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. §824(a). That broad authority expressly encompasses exclusive jurisdiction over the rates for wholesale transactions, which is set forth in broad and inclusive terms. FERC has exclusive authority to regulate all "rates and charges made, demanded, or received ... for or in connection with" interstate wholesale sales. *Id.* §824d(a). This Court thus has recognized repeatedly that the FPA left "no power in the states to regulate ... sales for resale in interstate commerce." *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964); *see also, e.g.*, *New York*, 535 U.S. at 21; *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956 (1986).

The exclusive and pervasive federal regulation of wholesale rates is particularly clear when it comes to wholesale sales of energy and capacity *to PJM* and other wholesale-market operators. Every aspect of the auctions through which PJM purchases and then resells energy and capacity at wholesale is subject to detailed oversight and approval by FERC. The auctions themselves, moreover, are the mechanism through which FERC exercises its authority to ensure

that the rates PJM pays to wholesale sellers are just and reasonable. By approving in advance the processes through which PJM will conduct its auctions and determine the market-clearing price that it will pay for the energy and capacity it purchases, FERC pre-approves the wholesale rates that those processes produce. A wholesale sale to PJM at the market-clearing price is therefore, by definition, a wholesale sale at the price that FERC has deemed just and reasonable. Accordingly, any effort to alter the price of a sale *to PJM* is, by definition, an effort to alter the wholesale rate approved by FERC.

Yet that is precisely what Maryland's order does. Indeed, the order is an unabashed effort to displace FERC's determination of what price should be "received" by a generator "for or in connection with" wholesale sales to PJM. 16 U.S.C. §824d(a). That is clear on the face of the pricing contracts that the order creates. By their plain terms, the contracts guarantee CPV a dollar-per-megawatt-hour (or -megawatt-day) rate, determined by the state's own regulatory process, for each unit of energy or capacity that CPV sells *to PJM* for 20 years. *See* JA364-65, JA366-67, JA388, JA389-90. In other words, the contracts specifically dictate what CPV will receive in connection with its sales to PJM. They do so by compelling local utilities to ensure that CPV receives a predetermined fixed rate for all of its actual, fully consummated wholesale sales to PJM for 20 years, regardless of what rate the FERC-approved PJM market mechanisms may produce for those very sales. If the PJM rate is lower than the rate in the pricing contracts (as is likely), then the EDCs must pay CPV the difference for each wholesale sale that CPV makes

to PJM. If the PJM rate is higher than the rate in the pricing contracts, then CPV must pay the EDCs the difference. Either way, the contracts ensure that, for 20 years, the rate CPV receives for its wholesale sales to PJM will be "different and more enduring than" the rate dictated each year by FERC's preferred and approved rate-setting mechanisms. Md.Br.3.

The economic effect of the order and pricing contract is thus exactly the same as if Maryland had simply passed a law that said, for every unit of energy or capacity that CPV sells to PJM for the next 20 years, Maryland itself will ensure that CPV receives $5, without regard to whether PJM is paying $4 or $6. The only difference is that Maryland's order shifts responsibility for paying the subsidy (or recouping the surplus) to the EDCs instead of having Maryland handle that detail itself. But that has no bearing on the preemption analysis because Maryland's scheme still ensures that CPV receives a price different from and more stable than what PJM itself is paying CPV—with FERC's approval—for the same sales.

This scheme cannot be saved by the fact that PJM itself continues to pay CPV only the FERC-approved market-clearing price. Even without statutory language directly on point, it would seem obvious that mandating an additional payment in connection with a sale dictates the effective price for that sale. But, here, the statute gives FERC the exclusive authority to determine not just what PJM should pay CPV, but what CPV "receive[s] ... for or in connection with" its sales to PJM, which are undeniably wholesale sales. 16 U.S.C. §824d(a). Even if the payment from an EDC to CPV is not a payment received "for" the interstate

wholesale sale to PJM, it is surely a payment received "in connection with" that sale.

According to petitioners, that is of no moment because Maryland is just trying to incentivize new generation, and the FPA preserves state jurisdiction "over facilities used for the generation of electric energy " *Id.* §824(b)(1). But no matter how broad the states' authority to incentivize new generation may be, it does not encompass the power to regulate the "rates and charges made, demanded, or received" by a generator "for or in connection with" wholesale sales—let alone to alter the rates that FERC *has already approved* for those wholesale sales. *Id.* §824d(a). That is not just the necessary "implication" of the FPA's basic division of power. *See* Md.Br.24. Congress *explicitly* subordinated the states' jurisdiction over generation to FERC's jurisdiction over wholesale sales. *See id.* §824(b)(1) (FERC "shall not have jurisdiction, *except as specifically provided in this subchapter and subchapter III of this chapter*, over facilities used for the generation of electric energy" (emphasis added)). Congress thus left states free to regulate most aspects of generation, but expressly denied them any power to regulate the rates that generators receive for their wholesale sales—even if the state tries to do so in service of some permissible state goal.

Indeed, even if the statute were less clear, there could be no serious dispute that the express grant of authority to FERC over the rate for a sale would preclude state authority to set a different rate for the exact same sale. A state statute purporting to set a different rate for deposits in the Bank of the United

States would have suffered the same fate as the Maryland statute in *McCullough v. Maryland*, 17 U.S. 316 (1819), whether or not Congress specified the relationship between federal and state authority. But this is an even easier case, as, here, Congress made clear that the states' reserved authority over generation cannot displace FERC's ability to set wholesale rates.

All of petitioners' talk about the states' traditional authority over generation, *see, e.g.*, Md.Br.29-30, and the presumption against preemption, *see, e.g.*, CPV.Br.28-31, is therefore beside the point. This is not an area where Congress has left some ambiguity as to the respective roles of the federal government and the states. Nor is it an area in which the line between federal and state power turns on "the *effect* of the State's program on prices in interstate electricity markets." CPV.Br.32. Instead, just as Congress expressly denied FERC *any* jurisdiction to regulate retail rates, it expressly preempted *any* authority states might otherwise have to regulate interstate wholesale rates. Accordingly, no matter what a state's motives or ultimate objectives may be, the rule remains the same: A state may no more use its statutorily reserved powers to regulate wholesale rates than FERC may use its statutorily granted powers to regulate retail rates. And a state certainly may not use its reserved powers to order that the rate of a wholesale sale be determined by something other than the market mechanisms that FERC has approved to govern *that very sale*.

Contrary to petitioners' contentions, this Court's decision in *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591

(2015), does not suggest otherwise. *Oneok* did not hold that so long as "a state program 'targets' or 'aims' at objectives within the State's own jurisdictional field," it is not preempted. CPV.Br.32. Nor could it have without ignoring the plain text of the FPA and abrogating decades of case law confirming that FERC alone has the power to decide what "rates or charges" may be "made, demanded, or received ... for or in connection with" interstate wholesale sales, 16 U.S.C. §824d(a). *See, e.g.*, *New York*, 535 U.S. at 21; *S. Cal. Edison*, 376 U.S. at 215; *United States v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295, 311 (1953).

Oneok instead simply held that FERC's exclusive authority over wholesale rates did not preempt application of state antitrust laws to an effort to manipulate wholesale rates when the state antitrust laws were "not aimed at natural-gas companies in particular," but instead had "broad applicability" beyond the field of natural gas. *Oneok*, 135 S. Ct. at 1601. But in doing so, the Court expressly distinguished laws of "broad applicability" from "'measures'" that, like Maryland's order, are "'*aimed directly* at interstate purchasers and wholesales for resale.'" *Id.* at 1599-600 (quoting *N. Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963)). *Oneok* thus does not remotely support the proposition that states may enact measures that are deliberately designed to alter the rate received for fully consummated wholesale sales, so long as they are doing so in service of achieving "objectives within the State's own jurisdictional field." CPV.Br.32.

Indeed, the cases the Court relied upon in distinguishing permissible from impermissible state

measures in *Oneok* expressly reject the notion that states may use their "'undoubted jurisdiction over retail sales'" to countermand FERC's regulation of wholesale sales. *Miss. Power*, 487 U.S. at 372 (quoting *Nantahala*, 476 U.S. at 970). Each of those cases unquestionably involved "a state program [that] 'target[ed]' or 'aim[ed]' at objectives within the State's own jurisdictional field," CPV.Br.32—namely, the regulation of retail rates. Yet this Court did not hesitate to conclude that the states' efforts to use retail rates to prevent utilities from recouping their full wholesale rates constituted impermissible incursions on FERC's "exclusive authority to determine the reasonableness of wholesale rates." *Miss. Power*, 487 U.S. at 371; *see also Nantahala*, 476 U.S. at 970. Whether those cases are better viewed as field or conflict preemption cases is beside the point; either way, they confirm that even the powers expressly reserved to states by the FPA may not be used to "collaterally attack[]" FERC's regulation of wholesale sales. *Miss. Power*, 487 U.S. at 375.

Maryland tries to distinguish *Mississippi Power* and *Nantahala* as involving state efforts to override FERC's wholesale rate regulation "*after* FERC accepted a wholesale rate," Md.Br.34, whereas here, Maryland has announced in advance its plans to displace FERC's approved market mechanisms for setting the rate for CPV's sales to PJM. But the FPA sets up a division between wholesale and retail regulators, not a race in which the first regulator to declare the just and reasonable rate for a wholesale sale wins. And states do not avoid preemption by making their intent to disregard federal law clear from the outset. Instead, the relevant question is whether,

not when, the state is attempting to override the FERC-approved rate for a wholesale sale. A state measure that does so is preempted whether it determines what CPV is to receive before or after the relevant PJM auction. In all events, FERC has made clear upfront that whatever rate the PJM auction produces is the just and reasonable one. Accordingly, Maryland's declaration that CPV will receive a different rate for 20 years no matter what the auction yields is about as clear as conflicts come.

CPV, for its part, tries to distinguish *Mississippi Power* and *Nantahala* as cases that involved "'efforts to prevent the wholesaler-as-[retail-]seller from recovering the costs of paying the FERC-approved rate,'" rather than to provide the wholesale seller with "an *additional* payment mechanism or payment stream" for its wholesale sales. CPV.Br.43-44 (quoting *Miss. Power*, 487 U.S. at 372). First, that purported distinction is not even accurate, as the pricing contracts expressly contemplate that CPV will receive *less* than the PJM rate whenever the contract price is lower than the auction price. But more to the point, preemption analysis does not turn on whose ox is gored. State efforts to increase the wholesale rate above what FERC deems just and reasonable carry just as much "sting of nullification," CPV.Br.44, as efforts to decrease it. FERC's exclusive jurisdiction allows FERC to approve actual wholesale rates, not just to construct a floor below which they may not fall.

At bottom, then, that Maryland purports to have been motivated by a desire to incentivize new generation does not alter the preemption analysis in the slightest. *Mississippi Power* and *Nantahala* both

involved state efforts to achieve ends that were perfectly legitimate under the FPA, via means—namely, the alteration of wholesale rates—that were just as plainly verboten. And a long line of this Court's cases extending well beyond those two precedents confirms that states cannot regulate wholesale rates for the best of reasons, the worst of reasons, or any reason in between. *See supra* pp. 27, 31-34. Accordingly, by claiming for itself the power to dictate what rate CPV will receive for its wholesale sales to PJM, Maryland has intruded upon FERC's exclusive jurisdiction over the "rates and charges made, demanded, or received ... for or in connection with" interstate wholesale sales. 16 U.S.C. §824d(a).

II. Maryland's Order Directly Conflicts With Federal Policy Judgments Underlying FERC's Regulation Of The PJM Market.

Maryland's direct interference with FERC's exclusive authority to determine what a generator will receive in connection with a wholesale sale to PJM could hardly be accidental. But Maryland's actions are all the more indefensible because they are the product of a deliberate effort to override federal policy judgments that Maryland tried unsuccessfully to change. Maryland's order is not only "'*directed at* ... the control of rates" for wholesale sales, *Oneok*, 135 S. Ct. at 1600; it is also directed at countermanding FERC's views about how long a period of price stability is appropriate for a new generator's sales to PJM. FERC said three years; Maryland asked for 10; and when FERC said no, Maryland attempted to dictate 20. The conflict is square and intentional. Petitioners resist that conclusion by pointing to FERC's efforts to

counteract the distorting effects of Maryland's order. But FERC's felt-need to adopt countermeasures hardly helps petitioners avoid the clear conflict that the order produces.

A. Maryland's Order Is an Avowed Effort to Override Federal Policies with Which Maryland Disagrees.

Maryland has made no secret of its dissatisfaction with FERC's regulation of the PJM market. In the words of the former PSC chairman, "there are a million things that are wrong with" PJM's FERC-approved pricing model, not the least of which is FERC's refusal to guarantee new generators a fixed price for their sales to PJM for longer than three years. JA655. In Maryland's view, these and other purported regulatory failings mean that "PJM will never provide the signals or the financial support to build power plants in Maryland." JA610. New Jersey, for its part, enshrined its comparable concerns in the statute that authorized its comparable initiative. Indeed, no fewer than four of the nine legislative findings in that law criticized PJM or FERC's regulatory decisions by name. *See* N.J.S.A. §48:3-98.2.

Maryland and New Jersey brought their concerns to FERC's attention and specifically argued that the three-year fixed rate provided by the NEPA was insufficient. But FERC does not share their view of what regulatory policies would be best for the PJM market. FERC fully understands that investors like stability and guaranteed returns, and that guaranteeing new generators a fixed return on their sales to PJM for a longer time period could incentivize more new generation. *PJM*, 128 FERC ¶61,157, at

¶94. But FERC does not consider long-term price guarantees for new generation the best way to secure the most efficient and cost-effective supply of energy and capacity in the PJM auctions. Instead, in FERC's view, "[b]oth new entry *and retention of existing efficient capacity* are necessary to ensure reliability" and efficiency. *Id.* at ¶102 (emphasis added). Accordingly, FERC has decided that new and existing generators generally should "receive the same price so that the price signals are not skewed in favor of new entry" *Id.* Because generators who cannot produce capacity as efficiently as their competitors will be forced to improve or to exit the PJM market, this approach results in "more efficient sellers and lower prices." *PJM*, 117 FERC ¶61,331, at ¶141.

FERC is not oblivious to the need for some stability in PJM rates as a means to spur new generation in some circumstances. FERC has addressed that need with the NEPA, which offers a three-year pricing guarantee to certain new resources in certain congested areas. But FERC intended the NEPA to be a limited exception to its general preferences that rates be set anew in each auction, and that new and existing generation participating in an auction receive the same price for their sales to PJM. In FERC's view, NEPA's three-year price lock-in suffices "to provide support to the new entrant until sufficient load growth would be expected to support the new entry." *PJM*, 128 FERC ¶61,157, at ¶101. But FERC has expressly rejected requests—including those of Maryland and New Jersey—to broaden the NEPA or extend it beyond three years, reasoning that "giving new suppliers longer payments and assurances unavailable to existing suppliers providing

the same service" would produce exactly the kind of "price discrimination" it does not want. *PJM*, 126 FERC ¶61,275, at ¶149.

Maryland's order is an unapologetic effort to achieve through state regulation what Maryland could not achieve by challenging FERC's policies directly.[3] Through the order, Maryland has devised a mechanism for providing a new generator with what FERC expressly refused to provide: a guaranteed rate for all its sales *to PJM* for 20 years. Maryland thus has not simply overridden FERC's approved market mechanisms for ensuring that the prices PJM pays are just and reasonable. It has countermanded FERC's judgment that three years is the optimal length for a price guarantee for sales to PJM by a new generator. In doing so, Maryland has created a clear "obstacle to the accomplishment and execution of the full purposes and objectives" of FERC's chosen regulatory approach. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000).

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[3] Although Maryland challenged the NEPA's three-year time horizon as insufficient, it never suggested that FERC was impermissibly regulating generation or that FERC's effort to adjust wholesale rates with an eye to their effect on investment in generation was somehow ultra vires. Thus, this case is very different from *FERC v. Electric Power Supply Association*, Nos. 14-840, 14-841 (U.S. argued Oct. 14, 2015), where the challengers strenuously contend that FERC has acted ultra vires and impermissibly regulated retail sales. And, unlike the demand response context, CPV's sales to PJM are unassailably wholesale transactions. But if EPSA's challenge does not succeed, no one would suggest that states could override PJM's price for sales of demand response to PJM. Yet that is effectively what Maryland has done in guaranteeing CPV 20 years of fixed payments in connection with its sales to PJM.

Maryland makes the puzzling argument that FERC's refusal to extend the NEPA was not intended to "preclude contracts through which *others* agree to pay" a generator a fixed price for its sales to PJM for longer than three years. Md.Br.44 (emphasis added). Thus, in its view, so long as the payments are coming from someone other than PJM, they do not interfere with FERC's objectives. That argument simply ignores the statute (which plainly extends FERC's authority to payments made in connection with wholesale sales) and FERC's stated policy rationale. FERC's objection to extending the NEPA had nothing to do with who is footing the bill for sales to PJM. It was instead grounded in FERC's judgment that the appropriate default rule is that new and existing generation facilities should receive the same price signals in connection with sales to PJM. FERC allowed a narrow exception in the NEPA, but specifically rejected Maryland's plea for a longer guarantee because it would undermine FERC's efforts to maintain pricing parity and an appropriate balance between "new entry and retention of existing efficient capacity" in the PJM auction. *PJM*, 128 FERC ¶61,157, at ¶102. Nothing in that reasoning turns on who pays for the longer guarantee; *any* longer guarantee of stable and different prices for the new generator's sales to PJM—no matter who foots the bill—would frustrate FERC's policy objectives. Thus, Maryland cannot escape preemption by saddling the EDCs with financial responsibility for its preferred 20-year guaranteed rate for CPV's sales to PJM.

That does not mean, as petitioners imply, that Maryland is forbidden from doing anything that might affect the price signals that the PJM auction provides

to incentivize new generation. Maryland is, for example, free to make those price signals less relevant by subsidizing new generation through tax incentives or similar financial support untethered to a generator's wholesale market participation. But Maryland cannot override the price signals that the PJM auction sends by establishing different effective prices for its favored generator's sales to PJM. Maryland also could have pursued FERC's fixed resource requirement option, which allows distributors to procure capacity *outside* of the PJM auction, through bilateral contracts or by constructing their own generation facilities. *But see* JA881 (state told consultants early on not to "waste a lot of time on FRR"). It could have established an agency to build a state-owned power plant and sell directly to retail consumers. Or it could have bypassed the wholesale market altogether and returned to the vertically integrated regime many states still retain. *See* JA211.

None of those options would pose the preemption concerns that Maryland's order poses because none would involve an effort to use the PJM auction itself as the primary means of incentivizing new generation. And none would involve dictating that the new generator must sell to PJM, must receive a rate different from that set by PJM for those sales, and must receive a stable rate for those sales for 17 years longer than the maximum allowed by FERC. It is that novel means of state regulation, "*aimed directly* at ... wholesales for resale," *Oneok*, 135 S. Ct. at 1600, that makes the preemption analysis in this case so straightforward.

In short, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Maryland has adopted an order that expressly targets a generator's actual wholesale sales to PJM—sales that occur through FERC-approved market mechanisms that produce rates deemed just and reasonable—and it has ordered that the generator receive a different and more stable rate for those sales. Worse still, Maryland has guaranteed CPV 20 years of rate stability for sales to PJM after FERC itself rejected Maryland's plea for a guarantee longer than three years. Thus, whether Maryland's order is viewed through the lens of field preemption or of conflict preemption, the result is the same: It is a blatant incursion on FERC's exclusive jurisdiction over the rates "received ... for or in connection" with wholesale sales, 16 U.S.C. §824d(a), that produces a blatant conflict with the policies FERC has pursued in approving those wholesale rates.

B. FERC's Efforts to Minimize the Distorting Effects of Maryland's Order Only Confirm the Clear Conflict with Federal Law.

Petitioners largely ignore the incontrovertible evidence that Maryland's order is a conscious effort to override federal policies that the state failed to persuade FERC to change. Instead, they claim that FERC's own actions either eliminated the conflict with FERC's regulatory scheme or confirmed the absence of any real conflict. Although a federal agency's need to adopt countermeasures surely indicates the presence, not absence, of a conflict, petitioners' counterintuitive argument was at least plausible before FERC filed a

brief in this litigation. But petitioners' continued insistence that FERC has eliminated any conflict is baffling now that FERC has expressly weighed in. As FERC has now confirmed, its adoption of measures specifically designed to try to counteract the distorting effects of state policies like Maryland's underscores, rather than eliminates, the clear conflict between those policies and federal law.

Petitioners' contrary argument rests on FERC's decision to make adjustments to its minimum offer price rule, or "MOPR," to try to minimize the effects of CPV's participation in the PJM auction. The MOPR is designed to address anti-competitive behavior through "the exercise of buyer market power," by targeting large *buyers* of capacity who also *sell* capacity *PJM*, 137 FERC ¶61,145, at ¶2. These net-buyers have an incentive to try to lower the market-clearing price by selling their capacity at a loss, in hopes of using savings on the buy-side to offset losses on the sell-side. The MOPR seeks to prevent this anti-competitive behavior by "setting a price floor" in the capacity auctions for generators with such incentives. *PJM Interconnection, L.L.C.*, 143 FERC ¶61,090, at ¶22 (2013).

By design, Maryland's order facilitates the same anti-competitive behavior. Although *CPV* is not both buying and selling from PJM, *Maryland* stands to benefit from any reduction in PJM rates, as its retail suppliers purchase much of their capacity from PJM. So by guaranteeing CPV a pre-set rate for any sales that it makes to PJM no matter what the market-clearing price may be, Maryland sought to incentivize CPV to offer its capacity into the auctions at an

artificially low price, in hopes of driving down the auction price and thereby lowering the wholesale purchasing costs that will be passed on to Maryland's consumers. In an effort to minimize this deliberately price suppressive impact of Maryland's (and New Jersey's) regulatory scheme, FERC extended the MOPR to CPV and the new generation that resulted from New Jersey's comparable scheme, setting an offer floor for these state-subsidized resources during their first year on the market. *PJM*, 137 FERC ¶61,154. After year one, these new resources are free to submit $0 offers for all future years.

Maryland bravely contends that FERC would not have bothered to revise the MOPR to try to "'reconcil[e] the tension'" between Maryland's order and federal policy if it considered the former altogether preempted. Md.Br.45 (quoting *PJM*, 137 FERC ¶61,154, at ¶4). But we are long past needing to draw inferences about FERC's views concerning preemption. FERC has been asked for its views about both Maryland's order and New Jersey's comparable statute, and it has provided them: Both programs are preempted because, *inter alia*, they "directly interfere with the competitive market mechanisms that the [PJM] auction uses to set wholesale capacity rates." CVSG.Br.17.

Moreover, Maryland draws precisely the wrong inference from FERC's efforts to minimize the distorting impact of Maryland's order. The very fact that FERC had to revise the MOPR to try to "reconcile the tension" that Maryland's order created is powerful evidence that the order is preempted. Federal agencies have no need to revise their own regulations

to counteract state measures that truly "work in tandem" with federal law. Md.Br.34. By conceding that FERC had to create new regulatory constraints to try to minimize the disruption Maryland's order caused, petitioners concede that the order not only intrudes on FERC's exclusive jurisdiction and overrides rates expressly approved by FERC, but also conflicts with the regulatory objectives underlying FERC's efforts.

According to petitioners, FERC's adjustments to the MOPR do not just mitigate the distorting effects of Maryland's order; they eliminate the conflict with federal policy entirely. Again, FERC begs to differ. As FERC has explained, Maryland's "program[] ha[s] a price-suppressive effect on the capacity markets—even after the Commission's 2011 amendment to the minimum-offer-price rule." CVSG.Br.16. At most, that amendment only "minimize[d]" the price-suppressive effect by forcing CPV to make a *more competitive* bid. CVSG.Br.16. But it did not change the reality that, as CPV has conceded, it would not have built a new generator *at all* but for the long-term pricing guarantee that Maryland supplied for its sales to PJM. Pet.App.81a-82a, 92a. Thus, had Maryland not overridden FERC's policy preferences, a lower-cost resource could be filling any need for new generation that PJM may have had. Conversely, if there were no such need, then PJM could have continued to be served by the resources already in place—which is exactly the result that FERC's policies are intended to achieve when a three-year pricing guarantee does not suffice to incentivize a new resource to enter the market.

CPV claims that even if FERC has not *yet* eliminated the conflict entirely, it is enough that it *could* revise its own regulatory scheme to fully "accommodate[]" Maryland's. CPV.Br.56. There are two fundamental problems with that submission. First, it is hardly the vision of cooperative federalism Congress had in mind in enacting the FPA. FERC could presumably fully countermand the distorting efforts of Maryland's order by directing CPV to return the payment from the EDCs. Maryland, in turn, could try to force someone else within its regulatory power to make an additional payment to CPV, and so on. Fortunately, the Supremacy Clause provides a clear answer that obviates the need for countermeasures and counter-countermeasures.

And that is the second flaw in CPV's argument: It gets matters exactly backward. Under our constitutional order, when state law conflicts with federal law, it is state law that must give way, not the federal agency that must adjust. U.S. Const. art. VI, §2. As this Court has observed, "FERC need not adjust its rulings to accommodate the [state scheme]. To the contrary, the State may not trespass on the authority of the federal agency." *Maryland v. Louisiana*, 451 U.S. 725, 751 (1981). Thus, even accepting petitioners' dubious contentions that Maryland's order is only a little "disruptive," or that FERC's rules could "easily" be changed to eliminate the disruption altogether, CPV.Br.55-56, the very fact that there is disruption necessitating change suffices to establish that Maryland's scheme not only intrudes on and overrides FERC's regulation of wholesale sales to PJM, but also poses a clear "obstacle to the accomplishment and

execution of the full purposes and objectives" of FERC's regulatory measures. *Geier*, 529 U.S. at 873.

III. The Pricing Contracts That Maryland's Order Mandated Are Neither Bilateral Contracts Nor Procurement Practices, But Rather Are Part And Parcel Of Maryland's Preempted Scheme.

Unable to defend Maryland's order on its own terms, petitioners instead devote the bulk of their briefs to trying to characterize Maryland's scheme as various things that it is not. But their efforts are unavailing, as there is simply no escaping the conclusion that the order and the contracts it produced are a straightforward effort to ensure that CPV receives something different from the FERC-approved rate for its sales to PJM.

A. The Pricing Contracts Are Not Bilateral Contracts for the Sale of Energy or Capacity at Wholesale.

Petitioners try to defend Maryland's actions by likening the state-mandated pricing contracts that its order creates to the kinds of "bilateral contracts" between market participants that FERC routinely reviews. That argument directly contradicts what petitioners argued below. In their view *then*, the contracts are *not* subject to FERC's review because they were not "made through bilateral agreements or through the PJM auction." CPV Reply Br.3; *see also, e.g.*, Md. Reply Br.2. Accordingly, for the first two years of the contracts' existence, CPV never once asked FERC to review them and denied FERC's authority to do so. JA141 n.14. Having failed to convince the lower courts that those contracts are

"pure financial contracts" and do not infringe on FERC's exclusive wholesale jurisdiction, however, petitioners now take the opposite tack and claim that they *are* bilateral contracts that FERC should review. In an effort to shore up that about-face, petitioners asked FERC to review the contracts the very same day that the Fourth Circuit affirmed the District Court's decision invaliding them.

Petitioners try to justify their late submission and reversal of position by claiming that they had no choice but to go to FERC at that point because the lower courts held that the pricing contracts are the kinds of contracts that FERC should review. *See, e.g.*, Md.Br.26 (purporting to "accept[] the lower courts' decision that the contracts here constitute FERC-jurisdictional rates"). The lower courts did no such thing. What they held is that the contracts are *invalid*, because they are the product of a *preempted* state regulatory effort to *override* the terms of FERC-jurisdictional sales between CPV and PJM. And they were right to reach that conclusion, as petitioners' earlier effort to treat the contracts as "pure financial contracts," divorced from any actual wholesale sales, is plainly meritless. *See infra* Part III.C.

But whiplash concerns aside, petitioners' late-breaking enthusiasm for FERC review of the pricing contracts is misplaced, as the pricing contracts are plainly not bilateral contracts in the relevant sense. Unlike an ordinary bilateral contract, they are not contracts for "the sale of electric energy at wholesale" from CPV to the EDCs. 16 U.S.C. §824(b)(1). The only sale of energy or capacity at wholesale connected to the contracts is CPV's sale *to PJM* through the PJM

auction, which FERC regulates through its approval of the auction mechanisms that PJM uses to set the market-clearing price. The contracts between the EDCs and CPV, by contrast, do not involve any sale of electricity to the EDCs; in fact, the EDCs do not purchase anything from CPV under those contracts. The contracts instead just require the EDCs to ensure that CPV receives a specified price for its sales of energy and capacity *to PJM*.

That is not a contract—whether bilateral or otherwise—for "the sale of electric energy at wholesale." Instead, it is just the mechanism through which Maryland sought to effectuate its preempted effort to ensure that CPV receives Maryland's favored price, and not FERC's, for the sale from CPV to PJM. As CPV itself put it below, the contracts are simply "a means of providing a subsidy in the form of a third-party payment" for a wholesale sale that CPV makes to PJM. CPV Reply Br. 3. If the state itself paid CPV a subsidy (or occasionally recouped a "rebate") for each of CPV's sales to PJM, its actions would clearly be preempted; FERC would not have to review the subsidy or rebate to determine whether the effective rate produced by the state's deviation from FERC's preferred rate was just and reasonable. FERC is not obligated to review Maryland's plainly preempted state-mandated subsidy/rebate arrangement here just because it involves something that Maryland denominated a "contract."[4]

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[4] Nor were respondents required to complain to FERC about the "contracts" produced by Maryland's regulatory scheme, rather than asking a court to invalidate Maryland's preempted

Petitioners are equally wrong to insist that the decision below threatens FERC's jurisdiction over actual bilateral contracts. As far as federal law is concerned, CPV remains just as free as any other FERC-jurisdictional seller to offer its energy or capacity to someone other than PJM at its preferred price, and to enter into a bilateral contract (whether short-term or long-term) to sell its energy and capacity to anyone willing to agree to its terms. The reason CPV had to resort to something other than a bilateral contract is that no one was *willing* to purchase all of its energy and capacity at its preferred price for 20 years. Pet.App.92a. If CPV had been able to locate a purchaser willing to do so, the bilateral contract that resulted would have been subject to the same FERC review as any other bilateral contract for the sale of energy or capacity at wholesale. But CPV opted to forgo the bilateral contracting process in favor of a state-mandated scheme that guarantees that CPV will receive a different rate for its sales to PJM from the rate FERC has determined to be just and reasonable. Having done so, CPV cannot escape the obvious preemption problem by pointing out that a bilateral contract would be subject to FERC review. A bilateral contract is not a state effort to dictate a different rate for sales *to PJM* from the rate FERC has already approved.

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actions. While FERC certainly could have opined that Maryland's order is preempted (as it now has, *see supra* Part II.B) had it been asked to review the contracts, it is the courts, not FERC, that have the power to enjoin state action that is preempted by the FPA. *See* 16 U.S.C. §§825p, 825m(a).

Petitioners' repeated reliance on the "statutory right" of sellers to decide "what they wish to sell and at what price," Md.Br.25, 27, fails for much the same reason. To be sure, CPV has the theoretical right to decide whether it is willing to sell its energy and capacity *to PJM* on the terms that PJM imposes (with FERC's blessing) on auction participants. And if CPV does not like PJM's terms, nothing in the FPA precludes CPV from offering its energy and capacity to someone *other than PJM* on terms more to its liking. The only constraint on CPV in that regard comes from Maryland, which requires CPV to bid its energy and capacity into PJM and conditions CPV's right to payment on clearing the PJM market. But once CPV decides to sell to PJM, it has no more "statutory right" than any other FERC-jurisdictional seller has to insist on being paid something different from the PJM rate for those sales. Contrary to petitioners' contentions, there is indeed "only one legal rate for capacity sales to PJM," Md.Br.23, and that rate is the one produced by the PJM auction. If CPV wants a different rate, then it must sell its capacity to someone else, not convince Maryland to force third parties to make additional payments for its sales to PJM.[5]

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[5] Maryland alludes to certain circumstances in which generators may receive something other than the market-clearing price for their sales to a wholesale-market operator. *See* Md.Br.36. But those are instances in which *the wholesale-market operator itself* pays the generator something other than the market-clearing price, consistent with the terms of its FERC-approved market mechanisms. They are not instances in which the seller (or a state) has unilaterally decided that *someone other than* the wholesale-market operator should pay the seller

CPV likewise gains nothing by emphasizing that much of the capacity sold to PJM is "already the subject of bilateral contracts." CPV.Br.15. To be sure, capacity purchased through a bilateral contract may be resold to PJM at the PJM rate, regardless of the rate at which it was first purchased. But when that happens, there is not one seller receiving two different payments *for the same sale*. There are two different sellers receiving two different payments for two different sales of the same capacity. The seller selling to a private counterparty receives the bilateral contract rate for that sale. And the buyer reselling to PJM receives the PJM rate for that resale—nothing more and nothing less. As PJM's own rules confirm, these are two separate transactions: "In no event shall the purchase and sale" of capacity through a bilateral contract "constitute a transaction *with* [*PJM*]." PJM Tariff 4.6(a)(i)-(ii) (emphasis added); *cf. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008).

Maryland ultimately acknowledges that the pricing contracts are not *really* bilateral contracts for the sale of energy or capacity from CPV to the EDCs. But it insists they should be treated as the "functional equivalent" thereof because Maryland could have achieved a similar result by requiring the EDCs to enter into bilateral contracts to actually purchase CPV's energy and capacity, and then forcing the EDCs

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something other than the clearing price for those sales. Beyond that, Maryland alludes only to contracts in which the generator sold its capacity to someone other than the wholesale-market operator. *See, e.g., Atl. City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002).

to turn around and resell it to PJM. Md.Br.41. But that scheme would suffer from much the same problem as this one, as it would still be designed not just to bring new generation to Maryland, but to suppress the PJM rate. After all, if all Maryland wanted were to bring more electricity *to Maryland*, then there would be no more need to require the EDCs to sell CPV's energy or capacity *to PJM* than there is to require CPV to do so. Maryland can conceive of no means of achieving its desired end without a requirement to sell *to PJM* because its desired end is and always has been to use a state-subsidized generator *to suppress the PJM rate.*

Indeed, the whole theory underlying the decision to subsidize new generation to sell into PJM is that, over time, CPV's existence will suppress the PJM rate below what the FERC-approved market mechanisms would yield in CPV's absence, so that Maryland can effectively recoup from the rest of the PJM market the subsidies that the EDCs would inevitably be required to pay CPV in the short-run. In other words, the whole point is for Maryland to use the PJM market to pay for the introduction into the PJM auctions of new generation designed to lower the market-clearing price below what FERC considers just and reasonable. That Maryland can point to other means through which it could have tried to have its cake and eat it too thus hardly strengthens its cause.

In all events, whether Maryland could have achieved its ends through a different scheme is beside the point. Maryland did *not* use a true bilateral contract or a convoluted requirement that EDCs purchase and resell CPV's new generation to PJM.

And the scheme it did adopt—forcing EDCs to make payments to CPV in exchange for nothing, in order to ensure that CPV enjoys stable receipts in connection with its sales to PJM—is plainly preempted.

B. The Pricing Contracts Are Not Efforts to Regulate the "Procurement" Practices of Local Utilities.

Petitioners fare no better with their appeals to states' traditional "authority over their distribution utilities' purchasing decisions" and "oversight of the[ir] utilities' procurements." Md.Br.30, 12, 8-10; *see also, e.g.*, CPV.Br.34. The fact that the EDCs are subject to Maryland's pervasive oversight explains why Maryland thinks it can force them to make payments to CPV for sales to someone else, but it does not insulate Maryland's actions from scrutiny. And in reality, those actions have nothing to do with any electricity "purchasing decision" of the EDCs. The EDCs do not "procure electric energy" under the contracts. They instead must still procure electricity for their customers from some other source, and paying CPV for its sales to PJM does not advance that ball. It just achieves Maryland's goal of ensuring that CPV receives a special rate for *its* sales to PJM. States do not have any "traditional" authority to order utilities to alter or supplement the FERC-approved rate that a FERC-jurisdictional seller receives for or in connection with its wholesale sales to someone else.

Petitioners' efforts to demonstrate that CPV, not Maryland, "set the rate" in the pricing contracts likewise miss the mark. *See* CPV.Br.37-38. First, the District Court rejected that argument as a factual matter, and petitioners offer no persuasive basis for

rejecting that factual finding. The rate is certainly not the product of arms-length negotiations between CPV and the EDCs. It is instead the product of negotiations between CPV *and Maryland*, which "reviewed, evaluated, and accepted" the price before ordering the EDCs to enter into the contracts. Pet.App.110a n.48. And once Maryland accepted the rate, only Maryland was in a position to force the terms of the agreement on the EDCs over their objection. The District Court was thus eminently correct to conclude that "although it was proposed by CPV, the contract price ... is a price 'set' or 'determined' by the PSC." Pet.App.110a n.48.

In any event, whether a state uses a "competitive" process or some other mechanism to decide how much more (or less) than the FERC-approved rate CPV should be paid for its sales to PJM is beside the point. Either way, the state created a regulatory mechanism for ensuring that a generator is paid something other than the PJM rate for those sales. That act itself is preempted, no matter how the state accomplishes it. That is not because "state-directed procurement of *any* FERC-jurisdictional product" is off-limits. Md.Br.32. It is because this particular "procurement" did not direct the EDCs to purchase any energy or capacity. It simply solicited bids for how much a new generator wanted Maryland to force the EDCs to pay the new generator in connection with its FERC-jurisdictional sales *to someone else*.

Petitioners' claims that the decision below threatens state procurement processes, or precludes "FERC-jurisdictional sellers [from] enter[ing] into contracts with counterparties that act on state orders," Md.Br.32-33, are thus as misplaced as their

analogous claims about bilateral contracts. The problem with the pricing contracts is not that they are state-mandated contracts. The problem is with *what* the state mandated. The state mandated a price for sales to PJM that is different from the price that FERC has deemed just and reasonable—namely, the price produced by the PJM auction. Finding *that* state action invalid will not endanger any pre-existing or customary state practice. Contracts like that did not exist before Maryland (and New Jersey) created them; affirming their invalidity thus will not disrupt the energy or capacity markets in the slightest. Instead, it will just reaffirm the status quo, under which the price that a seller gets paid for its sales to PJM is determined by the market mechanisms that PJM has created and FERC has approved.

C. The Pricing Contracts Are Not Compensation for Something Other than Wholesale Sales.

With nothing else left to offer, petitioners revert to their twice-rejected argument that the pricing contracts are not payments for CPV's sales to PJM, but are instead payments for various other "benefits" CPV is providing. According to Maryland, those payments are "consideration for [CPV's] long-term commitment" "to offer capacity in the PJM auction each year for twenty years." Md.Br.37. But CPV does not get payments under the contracts just for *offering* its capacity to PJM. CPV gets paid only if it actually *sells* capacity to PJM. *See* JA396. If PJM does not accept CPV's "offer," then CPV gets nothing. The pricing contracts thus are plainly designed to provide

CPV with "consideration" for its *actual sales* to PJM, not just for its "commitment" to try to make them.

That the contracts provide "long-term" rather than "short-term" compensation for those sales does not help Maryland's cause. *PJM* gets to decide (subject to FERC's approval) whether to guarantee generators a one-year rate, a three-year rate, a 20-year rate, or some other rate entirely for sales into its auctions. And PJM decided (and FERC agrees) that it should not provide new generators with a guaranteed rate for more than three years. If CPV wants a more stable rate than PJM is offering, then it must sell its capacity to someone that is willing to provide one. *That* is the mechanism through which FERC leaves "room for long-term contracts to exist alongside the shorter-term auction." Md.Br.37 The FPA does not leave room for two different contracts providing two different payments—one approved by FERC and the other by the state—for the same sale.

CPV, for its part, claims that the payments are for building a power plant, not for selling energy or capacity. *See, e.g.*, CPV.Br.44. As both courts below correctly concluded, that argument blinks reality. Again, payments are made under the contracts *only if* CPV sells capacity and energy to PJM. CPV can build a plant all it wants, but if at any point CPV fails to sell to PJM, it gets nothing. *See* JA396. Maryland itself made clear in its request for proposals that the pricing contract was designed to "provid[e] compensation to Supplier *for Capacity and Energy*," JA308 (emphasis added), not just for building a power plant. Moreover, CPV's own witness agreed that "the financial considerations taken into account" when determining

the contract price went well "beyond recouping the costs for physically constructing a generation facility"; they were "the same types of financial concerns or factors ... taken into account by an existing generation resource when formulating the price at which it is willing to bid into the [auction]." Pet.App.114a; JA731-32.

CPV attempts to dismiss the direct link between contract payments and actual sales to PJM as an effort to ensure that the new generator would bring Maryland all the benefits that it seeks. But, once again, that just underscores the more fundamental problem with Maryland's regulatory scheme, which is that the benefit Maryland was seeking was not just new generation in Maryland, but the suppression of PJM prices. If all Maryland wanted were to ensure "enough generating capacity" to serve Maryland, Md.Br.31, then it would have been just as happy with a generator that sold its electricity directly to Maryland's residents, or to a state agency that did the same. Maryland instead wanted something more: It wanted its new generator to sell its capacity *to PJM* so that its low bids into the auction could displace more efficient, non-subsidized PJM resources and hopefully drive down the PJM rate, thereby artificially lowering the state's wholesale purchasing costs in the long run.

Petitioners' efforts to explain away the obvious preemption problems with Maryland's order thus succeed only in confirming that the order intrudes on FERC's exclusive jurisdiction not just once over, or even twice over, but thrice over. It displaces the rates that FERC has approved for CPV's wholesale sales to PJM. It provides a long-term pricing guarantee for

sales to PJM that FERC has deemed inconsistent with federal policy objectives. And it does all of that in service of attempting to depress the PJM rate below what FERC considers just and reasonable, in an effort to ensure that Maryland can have its cake and eat it too. Thus, by every conceivable measure, Maryland's order is incompatible with the FPA and the Supremacy Clause.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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